OTHER CASE LAW

CONSTITUTIONAL AND STATUTORY PROVISIONS

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

1. For the cases from **federal courts:**

   a. The denial of the United States court of appeals appears at Appendix A to the petitioner's Petition For Rehearing En Banc and is unpublished.

   b. The opinion of the United States Court of Appeals appears at Appendix B to this petition and is unpublished.

   c. The opinion of the United States district court appears at Appendix C to the petition

and is unpublished.

2. For the cases from **state courts**:

   a. The opinion of the highest state court to review the merits merely denied petitioner and is unpublished.

   b. The opinion of the Court of Appeals for the Fourth District, Division Three appears at Appendix D to petition and is unpublished.

JURISDICTION

The court of appeal's judgment was entered on May 16, 2005. A timely petition for rehearing was denied on July 25, 2005. The jurisdiction of this Court is invoked under 28 U.S.C., section 1254(1).

In unpublished opinion the Ninth Circuit dismissed with prejudice petitioner's 1983 Civil Rights Action, Tittle v. Bottorff-Tittle et al, 131 Fed Appx 555 (9th Cir. 2005).

Prior to the above opinion, the federal district granted a dismissal of petitioner's complaint pursuant to Federal Rules of Civil Procedure, Rule 12 (b)(6). A dismissal on a failure to state a claim operates as an adjudication on the merits, NAACO v. Hunt, 891 F.2d 1555, 1560 (11th Cir. 1990).

The granting of a motion to dismiss, is a question of law wherein review plenary granted, New Valley Corporation v. United States, 119 F.3d 1576, 1580 (Fed. Cir. 1997).

Congress has provided under 28 U.S.C., section 1254 that the United States Supreme Court may review cases by Writ Of Certiorari cases in federal court by petition of any party.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED.

a. Federal Violation In State Courts

The initial constitutional question, as set forth in petitioner's 1983 complaint was that during petitioner's divorce proceedings, petitioner was suffering from clinical depression and was under continuous psychiatric care at local hospitals.

Petitioner claims that while he was in the state court, he was continuously denied a fair hearing under the Fourteenth Amendment of the constitution.

Also, during said divorce, and subsequently during a state civil action, the petitioner repeatedly informed the state trial and appellate courts that while under continuous psychiatric care, the defendant

Dorothy Bottorff-Tittle and her attorney intercepted, misdirected and opened plaintiff's United States Mail in violation misdirected, 18 U.S.C. sections 1702 and 1708; 39 CFR section 233.1 et seq., 39 CFR section 946.1 et seq., and United States v. Brown (1970) 425 F.2d 1172, 1173-1174 and attempted to gain control of the contents of plaintiff's workers compensation checks in approximate amount of $10,000.00. Latter, in Dorothy D. Bottorff-Tittle appellee's answering brief in the Ninth Circuit, appellee's attorney Paul N. Jacobs admitted that during the state divorce proceeding , his client was instrumental in intercepting the petitioner's United States mail. This was a clear admission as set forth in Federal Rules of Evidence, Rule 801(d)(2)(C) or (D); and

4 Saltzburg, Stephen A., et al., Federal Rules of Evidence Manual, section 801.02[6][f][vi], (Lexis-Nexis 2002).

Under the Supremacy Clause of the Federal Constitution, the State of California was without discretion in enforcing federal criminal statutes, Second Employers' Liability Cases, 223 U.S. 1, 58, 56 Led 327, 32 S.Ct. 169 (1991); Miller v. Municipal Court (1943) 22 Cal. 2d 818, 850-851 and Gibson v. Berryhill, 411 U.S. 564, 575-579, 93 S.Ct. 1689, 36 LEd 2d 488, 93 S.Ct. S.Ct. 1689.

Appellee, State of California, Orange County, and Superior Court of California has repeatedly refused to act in this matter and there by shown their indifference to federal penal statutes.

b. Violation of Federal Constitutional Rules In Federal Court.

During defendant's oral hearing on the 12(b)(6) motion to dismiss, petitioner's former attorney informed the district court judge that petitioner was under continuous psychiatric care at a local veterans hospital, and that some of these medical records were pending in a federal district court case.

Again, the petitioner was further denied his Procedural Due Process hearing rights under the Fourteenth Amendment and the Federal Rules of Civil Procedure, Rule 17(b)(c); and United States v. 30.64 Acres of Land, 795 F.2d 796, 804-806.

STATEMENT

A. Petitioner's History of Defendant's Denial of Procedural Due Process In California State Courts. California Civil Procedure Code, section 372 and 373 were passed by the state legislature in 1872.

Beginning in 2001, the California appellate court inferred that Due Process was required before a guardian ad litem was appointed, In re Sara D. (2001) 87 Cal.App. 4th 661, 667-671, 104 Cal.App. 2d 909; In re Jessica G. (2001) 93 Cal.App. 4th 1180, 1187-1188, 113 Cal.Rptr 2d 714, and In re Joann E. (2002) 104 Cal.App. 4th 347, 354-361, 128 Cal.App. 2d 189.

Prior to the above cases, the California Supreme Court also inferred that it was the duty to protect an incompetent person on appeal, Guardianship of Walters (1951) 37 Cal. 2d 239, 243-244, 231 P.2d

473.

On or about February 1996, the California Worker's Compensation Board law judge awarded the petitioner disabilities benefit based in part of certain mental disabilities. The listed disability included clinical depression. Clinical depression is a bases for incompetency, California Probate Code, section 811 (a)(D)(4) (APPENDIX D, pages 8-10).

On or about January 6 1996, the petitioner initially filed for Federal Social Security Disability Benefits. Part of his Social Security disability claim is for clinical depression. On or about December 1, 1994, the petitioner's former wife filed for divorce in orange County Superior Court. During these proceedings and while petitioner was living apart,

petitioner's United States mail, which included his workers's compensation checks, was intercepted and petition believes opened by his former wife and her attorney. Petitioner's former wife and her attorney attempted to make these checks a part of his divorce proceedings.

During the divorce proceedings, petitioner and his former wife entered into a land sales contract on Arkansas real property. This contract specifically states Arkansas law would govern this contract. An unresolved party to this written agreement was the Arkansas real estate broker.

In all of the State of California court proceedings, the California court were informed that the petitioner was suffering from questionable mental

state, yet no action was ever taking to provide for a competency hearing as to a guardian ad litem, California Civil Procedure Code, section 373(c); and In re Daniel S. (2004) 115 Cal.App. 4th 903, 912, 9 Cal. Rptr. 3d 646.

Again, a determination of competency is a question for the court or jury after a fair hearing, Walton v. Bank of California (1963) 218 Cal.App. 2d 527, 541, 32 Cal.Rptr. 856.

In petitioner's California Fourth Appellate Opening Brief and Reply Brief petitioner again raised his denial of Procedural Due Process Rights hearing as provided under California Civil Procedure Code, section 373(c) and under the Fourteenth Amendment. In California, the general rule is that a constitutional

question must be raised at the earliest opportunity or it will be considered waived, Geftakys v. State Personnel Board (1982) 138 Cal.App. 3d 844, 864, 188 Cal.Rptr 305.

At no time did the state appellate courts rule on petitioner's constitutional claims of denial of Procedural Due Process Rights (APPENDIX D).

B. Petitioner's Federal Civil Rights Complaint.

A 1983 Civil Rights claim for relief merely requires that the pleader state (i) a violation of his or her protected rights under federal statute or regulation (2) the proximate causes of plaintiff's alleged injuries (3) the conduct was done by a person, (4) who acted under color of law, statute ordinance, regulation,

custom or usage of any State, Territory or District of Columbia, and where a municipality is named (5) the violation of plaintiff's federal rights was the result of the enforcement of a municipal policy or practice, Collins v. Harker Hights-Texas, 503, U.S. 115, 119-127, 117 L.Ed 2d 261, 112 S.Ct 1061 (1992).

At least one opinion has stated that a civil rights complaint should not be dismissed for failure to state a claim unless the complaint appears beyond doubt that plaintiff can prove any set of facts in support of his or her claim, Conley v. Gibson, 335 U.S. 41, 45-46, 2 L.Ed 2d 80, 78 S.Ct. 99 (1957).

Merely attaching a copy of the state appellate opinion to a Civil Rights action will not invoke Rooker-Feldman doctrine and thereby defeat the Civil

Rights claim, Nesses v. Shepard, 68 F.3d 1003, 1005 (7th Cir. 1995); and Brokaw v. Weaver, 305 F.3d 660, 664-665 (7th Cir. 2002).

C. The Rooker-Feldman Doctrine Does Not Apply Because The State Appellate Judgment Did Not Consider Petitioner's Constitutional Claims.

The Court has long since accepted that a denial of state Procedural Due Process Rights will give rise to a Civil Rights claim, Zinerman v. Burch 494 U.S. 833, 840, 140 L.Ed 2d 1043, 118 S.Ct. 1708.

In Zinerman v. Burch, the Court also reasoned that the constitutional, violation, or violations, actionable under Section 1983 is not complete until the State fails to provide the Procedural Due Process

sought, Zinerman v. Burch, at 126.

The procedure does not manifest until after the state judgment is final. If the Ninth Circuit claim of intertwining would trigger the Rooker-Feldman Doctrine nearly all procedural due process violations under the Fourteenth Amendment would be barred, Briggs v. City of Rolling Hills Estates (1995) 40 Cal.App. 4th 637, 646-648, 47 Cal.Rptr. 2d 29. Rooker-Feldman Doctrine depends weather a state court action is inextricably intertwined with a claim raised in federal court, as would bar federal review under Rooker-Feldman Doctrine, hinges on whether the federal claim alleges that the injury caused by a lower court judgment or alternatively is based upon the lower courts failure to properly address or fails to

address alleged independent clause in a action which state court failed to remedy, like the theft of his United State Mail to grain control of it contents, Truserv Corp. v. Flegles, Inc. 419 F.3d 584, 585(Note 10) (7th Cir. 2005). The Truserv Corp. case show that the 7th Cir. Has all together different point of view of the Rooker-Feldman Doctrine, then the 9th Cir.. The parties Mr. Tittle and Ms Bottorff-Tittle can change personal jurisdiction as they did in the real estate contract under Arkansas law, see Trserv Corp. case below.

The case of Truserv Corp. v. Flegles, Inc. 419 F.3d 584, 585 (7th. Cir. 2005) states the following in jurisdiction:

__ "personal jurisdiction is waivable and

that parties can, through forum selection clauses and the like, easily contract around any rule we promulgate".

The United States case states that parties may stipulate to another jurisdiction in their contract as they did in the Arkansas real estate contract, by which they stipulated to use Arkansas state law, Burger King Corp. v. Rudzewicz, 471 USD at 472n14 (1985), 85 Le2d 528, 105 S.Ct. 2174.

D. The Rooker-Feldman Doctrine Should Not Apply To Petitioner's 1983 Civil Rights Actions Where The State Courts Failed To Provide A State Ruling On Federal Constitutional Questions.

In petitioner's federal Civil Rights actions,

petitioner is not requesting the federal court to review the California Fourth Appellate District's unpublished Opinion.

Petitioner merely raised those Constitutional issues that were procedural in nature and not ruled upon by the state courts.

The Ninth Circuit and the Tenth Circuit has a long standing policy that when the state plaintiff has been denied a meaningful opportunity to litigate constitutional violations in state courts, the federal plaintiff may raise these federal constitutional challenges in federal district courts, Robinson v. Anyaski, 753 F.2d 1468, 1468, 1472-1473 (9th Cir. 1995) violated on other grounds, 477 U.S. 902, 91 Led 2d 560, 106 S.ct. 3265; and Merrill Lynch

Business Financial Service, Inc. v. Nudell, 363 F.3d 1072, 1075-1076 (10th Cir. 2004).

This case also is about denial of Procedural Due Process by the state. In the state courts opinion there is a question of denial of due process as that stated in Lujan v. G & G Fire Sprinklers, Inc. 532 US 189, 195 (2001), the case states as follows:

> Where a state law such as this is challenged on due process grounds, we inquire whether the State has deprived the claimed of a protected property interest, and whether the State's procedures comport with due process. ---. ("[T]he Due Process Clause grants the aggrieved party the opportunity to present his case

and have its merits fairly judged").

WHY THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

There continues to be a ever widening conflict between the decisions of the federal courts of appeal on the application of the Rooker-Feldman doctrine with violations of Procedural Due Process in state courts, Robinson v. Ariyoshi, 753 F.2d 1468, 1472-1473 (9th Cir. 1995); Bianchi v. Rylaarsdam, 334 F.3d 895, 898 (9th Cir. 2003), and Catz v. Chalker, 142 F.3d 279, 290-295 (6th Cir. 1998).

In Civil Rights claims, the court has accepted claims based upon a denial of Procedural Due Process, Zinerman v. Burch, at 127-139.

Still another conflict exists on the application of

Rules 17(b) and (c), of the Federal Rules of Civil Procedure. Rule 17(b) and (c) sets the standard for the application of guardian ad litem in federal courts. Some circuits require a filing of a formal motion and other circuits allow a sua sponte inquiry, Ferrelli v. River Manor Health Care Center, 323 F.3d 196, 201-202 (2nd Cir. 2003); and United States v. 30.64 Acres of Land, 795 F.2d 796, 805 (9th Cir. 1986).

Finally, there remains an existing conflict as to the application of Rule 12(b)(6) motion. Petitioner was not allowed to amend his Civil Rights claim before it was formally dismissed. The general rule is in Civil Rights claim, the claim or claims should not be dismissed unless it appears beyond a doubt that the federal plaintiff cannot prove any set of facts in

support of his or her claim, Conley v. Gibson at 45-46.

Some Federal Courts of Appeal indicate that leave must be granted unless the dismissing court has "substantial reason" to deny, Rolf v. City of San Antonio, 77 F.3d 832, 828 (5th Cir. 1996).

Again, in petitioner's case, he was not ever granted leave to amend.

A. The Decision below Is Incorrect.

In petitioner's Ninth Circuit case, the reasoning was not sound. The court below was in conflict with its own Ninth Circuit cases as to its application of the Rooker-Feldman doctrine. There was no lack of subject matter jurisdiction.

E. IN ALL THE COURT DECISION, HEARINGS

AND DISCOVERY DID THE COURT ALLOW EXPERT WITNESSES FOR APPELLANT CHARLES TITTLE BE HEARD OR A TRIAL ON THE MERIT OF THE CASE TAKE PLACE. ESPECIALLY IN THE APPELLANT'S MENTAL STATE.

At no time in the State court proceedings was the petitioner (appellant /petitioner Charles) afforded an opportunity to be examined by a medical doctor to determine his mental state. But, in the state appellate court decision, (See state appellate decision, there was no medical examinations).

Issues preclusion only applies where:

(1) the issue in question was actually and necessary decided in the prior proceeding,

and

(2) the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate the issue in the first proceedings [citation]

Hoblock v. Albany County Board of Elections 442 F.23 77, 92-95 (2nd Cir. 2005).

In the state appellate decision, they state sufficient evidence to have a hearing on incompetency and refused to follow the law.

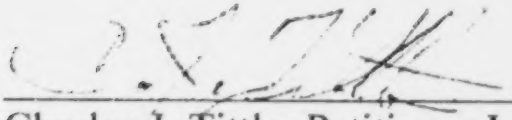
CONCLUSION

This Court should review this case because the undermining of the Government "dispute" process

and potential between federal agencies, which the decision below makes possible, is a matter of substantial public importance and concern. For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted and allow petitioner to file an Opening Brief.

Dated: December 17, 2005

Respectfully submitted



Charles J. Tittle, Petitioner In Pro Se

LIST OF PARTIES IN COURT BELOW

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   714-840-3487

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   Respondent

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES J. TITTLE

Plaintiff-Appellant,

V.

DOROTHY D. BOTTORFF-TITTLE ; et al

Defendant-Appellees,

No. 04-56273
D.C. # CV-04-00521-CJC
Central District
District of California

ORDER

Before: PREGERSON, CANBY AND THOMAS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition

for rehearing en banc and no judge has requested a vote on weather to rehear the matter en banc. See Fed. R. App. P. 35.

The petition for panel rehearing and the rehearing en banc are denied.

No further fillings will be accepted in this closed case.

B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES J. TITTLE

Plaintiff-Appellant,

V.

DOROTHY D. BOTTORFF-TITTLE ; et al

Defendant-Appellees,

No. 04-56273
D.C. # CV-04-00521-CJC
Central District
District of California

MEMORANDUM*

Appeal from the United States District Court for the Central District of California Cormac J. Carney, District Judge, Presiding

Submitted May 9, 2005**

Before: PREGERSON, CANBY AND

THOMAS, Circuit Judges.

Charles J. Tittle appeals pro se the district court's dismissal with prejudice for lack of subject matter jurisdiction under the Rooker-Feldman doctrine of his

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral arguments. See Fed. R. App. P. 34(a)(2).

§ 1983 civil rights action against his former wife Dorothy, the Superior Court of Orange County, Orange County, and the State of California, arising from their divorce proceedings in state court. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we review de novo a dismissal for lack of subject matter jurisdiction, see Bianchi v. Rylaarsdam, 334 F.3d 895, 898 (9th Cir. 2003). We affirm.

We conclude that the claims raised by Tittle in his § 1983 action are "inextricably intertwined" with the state court decision rendered in relation to the Tittle's marriage dissolution proceedings such that the adjudication of the federal claims would undercut those state court rulings. Id. (Noting that Rooker-Feldman "prevents federal courts from

second-guessing state court decision").

Accordingly, the district court properly dismissed the complaint for lack of subject matter jurisdiction. See Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 125 S Ct. 1517, 1521-22 (2005) (holding that Rooker-Feldman applies to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court's proceedings commenced and inviting district court review and rejection of those judgments").

All pending motions and requests are denied as moot.

AFFIRMED.

J

NOT TO BE PUBLISHED IN OFFICIAL

REPORTS

IN THE COURT OF APPEAL OF THE STATE

OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CHARLES J. TITTLE

Plaintiff-Appellant,

V.

DOROTHY D. BOTTORFF-TITTLE ; et al

Defendants-Appellees,

G030715

(Super. Ct. No. 807533)

OPINION

Appeal from a judgment of the Superior Court of Orange County, William M. Monroe, Judge. Affirmed. Sanction request by respondent remanded with directions.

Stephen W. Johnson for Plaintiff and Appellant.

Jacobs & Dodds, Paul N. Jacobs and Debra A. Dodds for Defendant and Respondent.

* * *

Charles and Dorothy were divorced in 1997.[1] One of the items of community property was a marina in Arkansas. The judgment ordered that the property be sold and the proceeds divided equally, subject to few provisions: Dorothy had contributed $12,000.00 of her separate property to the acquisition of the marina, so she was to receive that money back. Further, the court found that Charles had "poorly managed" the property, and therefore any adverse tax consequence as a result of 1995 and 1996 tax returns were to be borne solely by him. Thus the judgment provided that Charles would indemnify Dorothy and

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1. We mean no disrespect by use of first names, which is now the common practice of the appellate courts to avoid confusion in domestic cases. (E.g., In re Marriage of Cherition (2001) 92 Cal.App. 4th 269, 280, fn 1). In fact, litigation designations in a domestic context, such as "appellant" and "respondent", are a position inconvenience to readers who must perform quick mental translation every time one of those terms is used.

hold harmless from all liability "therefrom"[2].

The problem was that the marina was only listed for sale at the time of the 1997 judgment. It had not been sold yet. At the time Charles was living there rent-free and he wanted to try to buy Dorothy out. However, there was also a $40,00.00 cash offer outstanding from a third party. Dorothy felt at a disadvantage in terms of the management of property; Charles was on site and Dorothy had no confidences in his ability to take care of the property. (According to one of Dorothy's declarations in the record, when bad weather had caused one secondary dock of the marina to break away from the shoreline, Charles'

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2. The judgment also provided that the court would "retain jurisdiction" over the marina. That was inaccurate drafting by Dorothy's lawyer, who wrote the judgment for the court. In reality the judgment should have said that the court retained jurisdiction over the issue of the disposition of the property.

idea of fixing it was simply to tie it to the shoreline.) So in December 1997 Dorothy agreed to deal, memorialized in form real estate sales contract, whereby Charles would buy her out for $40,000.00, with her receiving $26,000.00 ($12,000.00 more than Charles would receive if a third party bought the property and the proceeds wee divided pursuant to the terms of judgment of dissolution). Payment was required by February 1, 1998.

However, the deal broke down and was never consummated because the parties fell into wrangling over whether Dorothy should assume any liabilities associate

with the marina. Essentially, Charles wanted the marina free and clear. Perhaps the best analogy is to a divorce settlement where one spouse is willing to walk away if paid a certain amount of money without the worry of any tax liabilities. In more specific terms, Charles wanted to be able to sue Dorothy for any liabilities he might encounter as new sole owner of the marina. (For example, it appears he wanted to sue Dorothy for certain purchases made on a Sam's Club credit card in the marina' name.)

Since there was still an outstanding offer by outsider to buy the marina for $40,000.00, Dorothy filed an OSC to force the sale to them. The hearing on the OSC was held April 14, 1998.

The OSC resulted in a handwritten stipulation and order (using the usual court form), in which

Dorothy would receive only $20,000.00 for her interest. Then again, Charles agreed to waive all spousal arrearages Dorothy might have owned him. Dorothy was also to receive $1,000.00 for attorney fees.

A week later, Dorothy's counsel finalized the stipulation. The lawyer, however, introduced a small change into the wording. Where the original handwritten stipulation had said that Charles "waives costs of said property repairs to property here", the typewritten stipulation said that Charles "waives all costs of the repairs to the Jackson Port, Arkansas property, and shall hold [Dorothy] harmless from same".

Did the small word change a substantive difference? Charles thought it did, at least enough so

to file, in May 1998, a formal objection to the new language. (Charles also objected to the "and shall hold [Dorothy] harmless from same" language in a clause where he waived all spoual arrearages that may be due him.)

Judge Carla Singer, however, apparently did not. On June 17, 1998, she specifically denied Charles' objection. The typewritten findings and order after hearing were then filed June 18, 1998. Charles subsequently paid the money and the deal went through; he became sole owner of the marina.

More than nine months later, on March 31, 1999, Charles filed this separate civil action against Dorothy for have backed out of the buy-out deal of December 1997. He followed his original complaint with a first amended complaint in late April 1999.

That summer, Charles resumed his activities on the family law court front with a motion to vacate the findings and order after hearing of June 18, 1998. That motion was denied in a written statement of decision signed by Judge Myron Brown[3]. Judge

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3. The original Judgment was supervised by Judge Nancy Pollard. The stipulation concerning the marina in Arkansas was supervised by Judge Carla Singer. Judge Myron Brown handled the attempt to vacate the findings and order after hearing signed by Judge Singer. Then Judge William Monroe got stuck with the civil case which was spawned from the family law case. This is the sort of nonsense that happens when problematic family law cases are passed from Judge to judge; no one Judge is ever able to detect that one party is abusing the system, (See, e.g.., Bidna the Rosen 1993) 19 Cal.App.4th 27, 38[to prevent one side trying to wear down the other, "we strongly emphasize the importance of extending single-judge calendaring to family law courts as soon as resources permit"].)

Brown gave no less than four independent reasons to deny the motion; Charles was too late. His motion was untimely under section 473 of the Code of Civil Procedure. The actual text of the finding and order of June 18, 1998 "substantially compli[ed]" with the handwritten stipulation. And there was no just cause to change or correct that order.

Judge Brown's family law court order was signed and dated December 17, 1999. That very day Charles filed a second amended complaint. The theory of that complaint was not so much that Dorothy had breach the buy-out contract, but that the June 18, 1998 order had to be set aside so that Charles could pursue a breach of contract against Dorothy, and the order had unjustly deprived him of that right. (Though the complaint also had breach of contract

action.)

After much discovery, Dorothy brought a summary judgment motion which was granted in early March 2002. Despite the fact the case had become, im judge Monroe's words, Charles' "consuming passion," Judge Monroe granted the motion. By late March there was a Judgment on file from which Charles has now brought this appeal[4]

4. As regards Charles' motions to take judicial notice: The motion is granted as to Charles exhibits in opposition to motion for summary judgment it is denied as to certain videotapes of hearing in family law court, as the trial court was not in any way provided with those videotapes.

II

A

The word "vexation" or some variant of it appears in the same paragraph with the legal doctrine "re judicata" in no less than 100 cases in the official reports. This is, one of the major reasons for the doctrine of re judicata is to prevent the vexation of repeated litigation over the same material. (See 7 Witken, Cal. Procedure (4th ed. 1997) Judgment, ¶280, p.820.)

Literally, res judicata is Latin for "a thing adjudicated." (Black's Law Dict. (7th ed. 1999) at p. 1312.) The point is, once the thing has been adjudicated, it is a waste of public resources and oppressive to the other side (the "vexation" part of the doctrine) to allow it be adjudicata again. Not

surprisingly, res judicata in the civil law is sometimes compared to the double jeopardy doctrine in the criminal law. (E.g., People v. Barragan (2004) 32 Cal. 4th 236, ___, 9 Cal.Rptr. 3d 76, 92 [noting overlap in purposes served by res judicata and double jeopady].) A litigation his consuming passion, "wear down an opposing party with repeated attempts to litigate the same "thing."

Our Supreme Court's most recent exploration of the subject, Mycogen Corp. v. Monsanto Co. (2002) 28 Cal. 4th 888, provides this clear operational description; "Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them ... under the

doctrine of res judicata, if plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent law suit; a judgment for the defendant serves as a bar to further litigation of the same cause of action." (Id. at pp. 896-897.)

At this point we should be careful not to confuse remedies with causes of action. Setting aside a judgment, for example, is a remedy. Vindicating a right to performance under a contract is a cause of action.

To define cause of action, California courts have traditionally used a " primary right theory." The accepted definition of a "primary right" is the plaintiff's

right to be free from the particular injury suffered."'

(See Mycogen, p.904, quoting Crowley v. Katlerman

(1994) 8 Cal. 4th 666, 681-682.)[5]

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5. As professor Heiser has shown, the primary right theory is an anchronistic anomaly in California procedural law. (See Walter W. Heiser, California's Unpredictable Res Judicata (claim Preclusion) Doctrine (1998) 35 San Diego L. Rev. 559) The problem is that in the late 19th century, joinder rules prevented the joining of general categories of claims. For example, the original version of former section 427 of the Code of Civil Procedure divided all claims into seven specific categories, and did not allow the joining of separate categories of claims in the same complaint. Given such rules, it was natural for our Supreme Court in the latter half of the 1800's to adopt the "primary rights theory" of Professor John Norton Pomeroy, who saw primary rights in term of various kinds of injuries suffered, such as injury to one's person, injury to one's property, injury to one's reputation, etc, (See id. at pp. 571-577.) But with repeal of former section 427 in 1972 and its replacement with a more modern transactional analysis test for joinder issues as exemplified in current section 428.10, subdivision (b) of the Code of Civil Procedure, California courts did not make the adjustment, and continued to pay homage to the primary right test in the res judicata contest. The matter is academic for purpose of this case, though, because the primary right test is the one more favorable to the plaintiff, and Charles' suit cannot even survive under it, much less the alternative transactional analysis test. While at least one California appellate opinion has tried to insinuate the transactional analysis test into our common law (see Nakash v. Superior Court (1988) 196 Cal.App.3d 59, 68 [dicta to the effect that "Analysis has shifted from identification of primary right upon which only one claim is allowed to determination of the existence of transaction involving a nucleus of facts upon which only one claim is allowed"]), that effort has showed remarkably little traction in subsequent Supreme Court decision, such

as Mycogen.

So let us ask the obvious question; What injuries does the complaint assert that Charles' suffered?

With regard to the breach of contract claim, we must parse things far finely. Preliminarily, as a matter of substantive contract law, it is clear that the April 1998 handwritten stipulation operated as a novation, extinguishing any obligation which Dorothy had to perform under the old December 1997 contract. (See Hiett v. Gassen (1919) 41 Cal.App. 620 [cancellation of real estate contract and buyer given option to purchase part of premises covered by old contract was novation, extinguishing seller's obligation under old contract].)

However, let us grant Charles' assumption that some right to sue Dorothy for some of the December 1997 deal might have survived the April 1998 stipulation. If the loss of a right to sue is the injury, then the loss of Charles' right to sue Dorothy was most certainly litigated in the family court, twice in fact: Once in Judge Singer's June 17, 1998 rejection of Charles' objections to the formal order, and again in Judge Brown's December 17, 1999 decision rejecting Charles' attempt to vacate the June

18, 1998 order. So if any hypothetically surviving breach of contract claim is clearly precluded by res judicata.

That leaves only (to draw perhaps a finer distinction) the injury to Charles from the fact that the findings and order of June 18, 1998 precluded him from a breach of contract claim by its hold harmless language. But that is not really a cause of action at all. It boils down, to deconstruct it properly, into the idea that one has a primary right to vindicate the loss of a previous primary right in some judicial proceedings, which is ridiculous on its face -- it's kind of infinite regression sealed off from any idea of res judicata, i.e. one can always just keep litigating one's last loss.

And yet, even if we grant the assumption that it

is a cause of action, that right was thoroughly litigated in front of Judge Brown in Charles' failed attempt to set aside the June 18, 1998 order. To reiterate, it is precluded by res judicata.

In sum, to the degree that Charles might have been unfairly deprived of some hypothetical right to sue Dorothy based on liabilities associated with the marina by virtue of the April 1998 stipulation and the June 1998 formal order, that right was litigated in the process of Judge Singer's consideration of Charles' June 1998 objections and Judge Brown's consideration of the motion to vacate. Indeed, there is nothing at issue in Charles' present lawsuit -- certainly no categorical species of harm to Charles -- that was not the subject of a claim litigated no less that twice in the divorce suit.

Charles argues that his lawsuit is not precluded by res judicata because a family law motion is not an "action" as defined in section 22 of the Code of Civil Procedure.

There are two refutation to this point. First, "action" as defined in section 22, by its terms, is not talking about primary rights for sake of res judicata, but is merely the description of the judicial process by which causes "of action" are processed. The actual text of section 22 (not quoted in the reply brief) is: "An action is an ordinary proceeding in court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." (Emphasis added.) By its terms, family law motions

are "actions." (See Lester v. Lennane (2000) 84 Cal.App.4th 536, 559 [observing that family law child custody proceedings are actions within the meaning of section 22].)

Second, a cause of action, as our Supreme Court has defined it for purposes of res judicata (i.e., under Mycogen, a right to be free from an injury) can most certainly include rights litigated under the family law act, including the right to own one-half the community property, including marinas in Arkansas.

Charles next argument is that res judicata does not attach to proceedings where only "declarations and law" are offered. That argument, as framed, is about as wrong as it is possible to be. It would mean, for example, that there would be no res judicata effect to cases decided on summary judgement motions

based only on "declarations and law." The two cases he cites for the proposition, say no such thing. Estudillo v. Security Loan & Trust Co. (1906) 149 Cal. 556 and Jeffords v. Young (1928) 98 Cal.App. 400 are both extrinsic fraud cases, and of course res judicata is not a bar to extrinsic fraud claim. But Charles has shown no fact indicating extrinic fraud in the case.[6]

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[6] Indeed, we might add Rubenstein v. Rubenstein (2000) 81 Cal.App. 4th 1131 ito the cases standing for the proposition that res judicata does not preclude extrinsic fraud claims. (See id. at p. 1152.) And in doing so, we must point out that, as Rubenstein also makes clear, the appropriate (and statutorily authorized) course of action in the case of extrinsic fraud in family law orders and judgements is a proceeding in family court under Family Code section 2122 to set aside the judgement. (See id at p. 1146; see also kuehn v. kuehn (2000) 85 Cal.App.4th 824, 834 [even remedy for concealment of community assets in dissolution action is not a separate civil tort claim, but a family court set aside motion].) In this case the set-aside- route has already been tried by Charles, and it was rejected by Judge Brown in December 1999. So we are back to the bar of res judicata.

B

The closest thing that Charles does come to makeing an extrinsic fraud claim is something that resembles an incompetency argument based on his suffering clinical depression. (See e.g., Olivera v. Grace (1942) 19 Cal.2d 570 [decedent sustained head injury resulting in a"a complete loss of mentality"; action ot set aside default judgement against the decdent allowed].)

The proposition runs his briefs that it was somehow Dorothy's duty to bring to the family law court's attention that he was suffering from severe

depression, was being treated for that depression at the time, and might not have been, to quote lear, in his perfect mind.

This case is a far cry from Olivera, where a head injury resulted in loss of all "mentality". (See Olivera, supra, 19 Cal. 2d at p.572.) Individuals suffering severe depression, and with far more to be depressed about than Charles has experienced on this record, subject to constant and agonizing pain, have been held to be legally competent to make more import decision than whether to give up the right to keep on suing one's ex-wife over matters collateral to the disposition of a single community assert in a divorce case. (See Bartling v. Superior Court (1984) 163 Cal.App. 3d 186, 189-193.) Indeed, the facts of the bartling case demonstrate the high threshold for legal incompetency

that courts must necessary uphold, lest nothing ever be final; A man with history of ehronic acute depression and anxiety checked himself into a hospital, where it was discovered he had a maligant tumor of the ling. A biopsy resulted in the collapse of his lung. Because he was suffering from emphysema, efforts re-inflate his lung failed. He was put on respirator and eventually placed in soft restraints to prevent him from removing it. (See id. At pp. 189-190.) Despite such a miserable existence and his history of depression, the appellate court had no trouble reaching the conclusion that he was legally competent to request that he be taken off respirator. (See id. At p. 193.)

Thankfully there is nothing of those sorts of facts in Charles' incompetency claim, even if we

credit all the evidence submitted in opposition to the summary judgment motion and the motion for new trial. We need only add that the evidence he submitted in opposition to the summary judgment motion -- the declaration of a nurse friend -- was certainly not sufficient to establish legal incompetency. All it showed is that Charles has been treated for depression over the years of his divorce. Ditto the evidence support the new trial motion. That was basically a May 1997 unauthenticated report by a psychiatrist engaged in a workers' compensation claim. That report hardly shows legal incompetence. Indeed, while it speaks of depression and anxiety, depression is conspicuosly missing in the disgnosis, "Anxiety disorder not otherwise specified". Most of his impairment were rated only slight to moderate.

There

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is nothing of the order that would approach the conditions in the Bartling case. And since the standard of review on new trial motion is abuse of discretion (unlike the first time around on summary judgment motion when the court must precisely right). Judge Monroe was on even stronger ground to deny the new trial motion than he was to grant the summary judgment motion.

Moreover, it is an idea devoutly to be opposed that a spouse in divorce case has some sort of duty to call the other spouse's supposed incompetency to the attention of the court, particularly when that incompetency is based on claim of depression or anxiety. Many people suffer anxiety or depression during divorce. If Charles' idea were to take hold in the law, nothing in our family law court would ever be

final. The trial judge here was very correct indeed to require substantial evidence of legal incompetency, not merely evidence of treatment for depression or anxiety.

C

independently of classic res judicata, Charles cannot sue Dorothy in civil court for what is, in its essence, nothing more than claims congnizable under Family Law Act. Neal v. Superior Court (2001) 90 Cal.App. 4th 22, 25, and D'Elia v. D'Elia (1997) 58 Cal.App. 4th 415, 419-422, are on point. In Neal, a man sued his ex-wife for breach of contract for not complying with the terms of the family law judgment. In D'Elia woman sued her ex-hush=band for securities fraud based on statements he made to her in the course of the dissolution proceeding. In the

present case, we have a man suing his ex-wife for false promises made in the course of an attempted settlement of a family law case, directly involving the disposition of community property, and subsequently litigated in the family law courts. In each case, the substance of the claims was an attempt to assert a right in civil litigation that the subject of a previous or concurrent family law proceeding.

D

So the judgment is clearly correct and must be affirmed. The other orders appealed from (the denial of a new trial motion, the denial of a motion to tax costs and the denial of motion to correct judgment) are correct as well, and also affirmed.

That leaves a motion for sanctions for a frivolous appeal, brought by Dorothy. On this point a little perspective is helpful: From the record before us, for the past five or so years, Charles has forced Dorothy to incur great legal expense in a civil case which is about nothing more that some ill-defined minor matter collateral to the disposition of one item community property in a divorce case.

We have seen this kind of case before (and no doubt every other appellate court in the state has as well). An ex-spouse with a word processor, apparently nothing else to do, and self-taught legal training to file pleadings and send discovery requests on the other ex-spouse immense legal expenses in pursuant of some matter that was settled in the divorce case. It is almost as if the one spouse does not want to

accept the fact of the divorce and wants to maintain some sort of relationship with his or her ex by litigating.

So sanctions are most asuredly in order. Charles shall be sanctioned. However, rather than determine the amount of sanctions ourselves now -- which are to include sanction for both the trial level and this appeal -- we will follow the precedents set in Askew v. Askew (1994) 22 Cal.App. 4th 942, 966-967, and Neal, supra, 90 Cal.App. 4th at page 27 and remand to the family law court the issue of the amount that Charles should justly pay for, as we put it in Neal, having dragged Dorothy "through this unnecessary excursion in the civil court" -- and again, at both the trial and appellate levels.

WE CONCUR: SILLS, P.J. MOORE, FYBEL, J.

D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

Case No. SACV 04-0521 CJC (Anx)

Date June 28, 2004

Title CHARLES J. TITTLE v DOROTHY D. BOTTORFF-TITTLE, et al

PRESENT

HONORABLE CORMAC J. CARNEY, UNITED STATES DISTRICT COURT JUDGE

Debra Beard	N/A
Deputy Clerk	Court Reporter

ATTORNEY PRESENT FOR PLAINTIFF

N/A

ATTORNEY PRESENT FOR DEFENDANT

N/A

PROCEEDINGS: ORDER DISMISSING CASE SUA PONTE FOR LACK OF SUBJECT MATTER JURISDICTION

Before the Court is Plaintiff's motion for a preliminary injunction suspending and restraining all proceedings in California court.[1] For the reasons set forth below, the Court sua sponte dismisses the case with prejudice due to lack of subject matter jurisdiction. In light of this dismissal, the Court will not render a decision as to the merits of the preliminary application injunction application.

The facts and circumstances of this case arise from the marriage dissolution proceedings of plaintiff Charles J. Tittle and his former wife (and defendant)

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[1] By Minute Order dated May 28, 2004 the court denied the portion of the application seeking a temporary restraining order.

Dorothy D. Bottorff. According to Plaintiff's Complaint, he was denied his constitutional due process rights by the California family courts during the dissolution proceedings because (1) despite the fact that he suffered from clinical depression, he was not provided a competency hearing nor appointed an guardian ad litem, (2) the court lost track of documents filed, and (3) the family court improperly altered the terms of a stipulated judgment between Plaintiff and Ms Bottorff. Additionally, Plaintiff complains that the California Superior Court (in which Plaintiff began new litigation after completion of the dissolution proceedings) and California Court of Appeals violated his constitutional rights by rejecting Plaintiff's breach of contract claim (breach of contract claims (based on the stipulated judgment

thatarose during the dissolution proceedings), refusing to set aside the family court judgment, and ultimately concluding that Plaintiff should be sanctioned for filing a frivolous appeal. In his Complaint, Plaintiff makes additional allegations against defendant for interception of the mails and improper receipt of his disability checks. As result, Plaintiff request a temporary restraining order, preliminary injunction, monetary damages, and declaratory judgments invaliding the prior state judgment and finding that Plaintiff had a valid breach of contract claim and that the family court improperly changed the terms of the stipulation and violated plaintiff's constitutional rights.

The Rooker-Feldman doctrine divests this court of its ability to adjudicate this matter. Under the

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

Case No. SACV 04-0521 CJC (Anx)

Date June 28, 2004

Rooker-Feldman doctrine, a federal district court does not have subject matter jurisdiction to hear a direct appeal from final judgment of state court. Moreover, it is a forbidden de facto appeal under Rooker-Feldman "when the plaintiff in a federal district court complains of legal wrong allegedly committed by the state court, and seeks relief from judgment of that court". The purpose of the Rooker-Feldman doctrine is to prevent federal courts from second-guessing the decision of state courts. The test for application of the

doctrine has been articulated as follows if the federal claims are inextricably intertwined with the state court's decision so that adjudication of the federal claim would undercut the state ruling or require interpretation of state court laws or procedural rules, then the federal complaint must be dismissed for lack of subject matter jurisdiction. Rooker-Feldman applies to state judgments even if the state court appeals are not final. The facts alleged by Plaintiff make this a clear case for application of Rooker-Feldman. Any adjudication of the merits of Plaintiff's claims of improper conduct by the state courts in the marital dissolution or other state court proceedings would require this court to review the previous litigation, a review that would run contrary to this Court limited grant of original jurisdiction. In other

words, it would be impossible for the Court to review in the abstrct Plaintiff's constitutional claims. That Plaintiff has couched his claim as arising under 42 U S C ł 1983 rather than a review of the state court decision does not change the analysis or negate application of Rooker-Feldman. Finally, even Plaintiff's allegations of improper interception ogf his worker's compensation checks are intertwined with the marital dissolution in state court as Plaintiff himself vlaims that the issue was raised and dismissed by the family law courts (Plaintiff's Complaint, II 15)

Additionally, the Court lacks subject matter jurisdiction to adjudicate this case because it is essentially a family law matter, left to sound discretion of the the state tribunal. The Supreme Court stated that the "domestic relations exception"

divests federal court of the power to issue divorce, alimony, and child custody decrees due to the fact that domestic relations belong to the laws of the state. Although not seeking a divorce decree in the traditional sense, Plaintiff's entire case emanates from state court litigation concerning a marital dissolution and he seeks (in part) a rewriting of the family court judgment, rendering application of the exception appropriate.[2]

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[2] In addition to the above doctrines that divest this Court of subject matter jurisdiction, the Court notes that there are numerous other justification for dismissing this action sua sponte. For example, the action is barred against the State of California and its courts by virtue of the Eleventh Amendment's grant of sovereign immunity. The Eleventh Amendment bars suits that seek either damages or injunctive relief against a state, an arm of the state, its instrumentalities, or its agencies Franceschi v. Schw[illegible] 57 F.3d 828, 831 (9th Cir. 1995). Similary, the § 1983 cause of action against Defendant Bottorff is unavailing as there is no allegation in the complaint that Ms Bottorff was acting under "color of state law" when she allegedly deprived Plaintiff of his constitutional rights. Finally, the allegations in Plaintiff's complaint also implicate the bar of res judicata. Plaintiff himself asserts that he raised his claims of incompetency, interception of mails, and due process violations in the state proceedings and that

Accordingly, the Court dismisses the present action with prejudice.

Pa

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these were either decided against him or ignored by the appeals court. Therefore, any adjudication in this Court would be a re-litigation of matters previously asserted and determined.

(3)

No. 05-985

In The
Supreme Court of the United States

CHARLES J. TITTLE,

Petitioner,

v.

DOROTHY BOTTORFF-TITTLE, et al,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Was Petitioner's federal complaint properly dismissed for lack of subject matter jurisdiction when the sole purpose of the federal complaint was to overturn judgments and rulings in two prior state court actions, one of which was a dissolution of marriage action?

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INTRODUCTION

This federal lawsuit is a continuation of an obsessive legal battle waged by Petitioner against Respondent Dorothy Bottorff-Tittle (hereinafter "Respondent"). Petitioner's attacks began during a state dissolution of the marriage action (hereinafter "Dissolution") between Petitioner and Respondent. Thereafter, Petitioner filed a state court action (hereinafter "state court action") against Respondent in an attempt to overturn rulings and judgments made in the Dissolution. All of the issues raised in the state court action had been determined in the Dissolution. Judgment was rendered for Respondent in the state court action and thereafter the state appellate court issued sanctions against Petitioner for the duplicative legal case.

This federal lawsuit is simply one more attempt by Petitioner to overturn the rulings in the Dissolution and to avoid sanctions issued by the state appellate court in the state court action. The district court dismissed the federal complaint for lack of subject matter jurisdiction holding that the claims raised in the complaint were inextricably intertwined with the prior state court rulings and had already been determined in those prior state court cases. The Ninth Circuit Court of Appeals affirmed.

OBJECTION TO PETITIONER'S STATEMENT OF JURISDICTION

Petitioner's jurisdictional statement is inaccurate. The federal complaint was not dismissed pursuant to a F.R.C.P. Rule 12 (b)(6) motion for failure to state a claim upon which relief can be granted. Rather the federal complaint was dismissed sua sponte by the district court for lack of subject matter jurisdiction.

Further, the petition is untimely. The petition prays for review of both the underlying order (and judgment) dismissing the federal complaint and the sanctions ruling in the state court action. The petition as to the state court action is untimely on its face. Judgment in the state court action was entered on March 21, 2002. The judgment was affirmed on appeal, and sanctions were issued, by opinion dated March 2, 2004. Petitioner's Appendix (hereinafter "Pet.App.") D. Petitioner's petition for review to the California Supreme Court was denied on April 21, 2004. This petition, filed in October of 2005, is late.

The petition is also untimely as it applies to the federal lawsuit since the intent of the federal complaint was to overturn a 1998 order in the Dissolution and to avoid the March 2, 2004 sanctions order issued in the state court action. In essence, the petition is an attempt to avoid the time limits within which

Petitioner was required to file a petition for writ of certiorari in those prior state court cases by filing this improper federal lawsuit and then seeking review of the issues in those prior state court cases through the dismissal of this federal lawsuit.

STATEMENT OF THE FACTS

A. THE DISSOLUTION

Petitioner and Respondent were married in California in 1985. During the marriage they purchased a marina (hereinafter "Marina"). On December 22, 1994 Respondent filed for dissolution of marriage. (Bottorff-Tittle v. Tittle, California Superior Court Case No. 94D11307) The Marina was a community asset to be distributed by the court in the Dissolution.

On August 15, 1996 the parties entered into a stipulation concerning certain worker's compensation funds. Allegedly two or three of the worker's compensation checks had been sent (due to Petitioner's own negligence) to Petitioner's prior address. There is no dispute that these misdirected checks were immediately given to Petitioner's counsel. The stipulation provided that Petitioner's attorney would maintain the workers compensation funds in an account until distribution of the assets in the Dissolution. These funds were an issue in the Dissolution.

There is also no dispute that Petitioner did not abide by the terms of the stipulation but simply cashed the checks and retained the funds himself.

Judgment in the Dissolution was entered on March 3, 1997. Both parties were represented by counsel. The workers compensation funds were formally released to Petitioner and the Marina was ordered locked and sold. The court retained jurisdiction over the sale of the Marina. No one appealed the March 3, 1997 judgment.

Petitioner did not cooperate in the sale of the Marina. In December of 1997 Respondent exasperatedly agreed to sell her portion of the Marina to Petitioner (hereinafter "December 1977 Agreement"). The sale was not completed because Petitioner sent no money or paperwork and attempted to unilaterally modify the terms of the December 1997 Agreement.

Respondent finally had to file an Order to Show Cause to enforce the March 3, 1997 Judgment in the Dissolution and to complete the sale of the Marina. At the hearing Respondent again agreed to sell her portion of the Marina to Petitioner as long as the court supervised the sale. A handwritten stipulation evidenced the terms of the agreement, including Petitioner's waiver of costs for repairs to the Marina and any alleged arrearages in spousal support.

A proposed Finding and Order After Hearing (hereinafter "Order") filed by Respondent's counsel stated that Respondent waived all costs of repairs to the Marina, all alleged spousal support arrearages "and shall hold Petitioner harmless from same." Petitioner filed unsuccessful objections to the hold harmless language in the Order. The court signed the Order on June 18, 1998. The transfer of the Marina was completed. No one appealed the June 18, 1998 Order.

On July 21, 1999 and over a year after the consummation of the Order, Petitioner filed a motion to vacate the Order. Petitioner again objected to the hold harmless language. Petitioner also filed a motion to overturn the August 15, 1996 worker's compensation stipulation. Petitioner's motions were denied. The court found no grounds to set aside the August 15, 1996 stipulation or the June 18, 1998 Order and held that the time to bring any such motion had expired.

Petitioner pursued the denial of his motions through the trial court and eventually filed three separate writs with the California Appellate Court. The California Appellate Court held that Petitioner's attacks on the August 15, 1996 stipulation and the June 18, 1998 Order were inappropriate and untimely. Petitioner filed no further papers in the Dissolution.

B. THE STATE COURT ACTION

The operative complaint in the state court action (Tittle v. Bottorff, California Superior Court case no. 807533) was based on the alleged "breach" of the December 1977 Agreement in the Dissolution and sought again to have the court remove the hold harmless language in, or to vacate, the June 18, 1998 Order in the Dissolution. The state court action was initially stayed because it was pending between the same parties and on the same issues as in the Dissolution.

After the state court action was resurrected, Respondent brought a successful motion for summary judgment. The motion argued in part that the state court action was an improper collateral attack on the judgment in the Dissolution and was barred by the doctrines of res judicata and collateral estoppel.

Petitioner filed opposition to the summary judgment motion, arguing in great part that he should be relieved of the hold harmless language in the Order because he was "incompetent" during the Dissolution. Petitioner submitted his evidence of incompetency, which showed that at one time he had suffered from depression. Petitioner never argued that the distribution of assets in the Dissolution was unfair, nor did he object to the sale of the Marina on the terms set forth in the

Order. Petitioner has never disputed that the Order was fully consummated.

The state court found the evidence of Petitioner's alleged incompetence lacking. On March 1, 2002 Respondent's motion for summary judgment was granted on numerous bases.

Petitioner filed an appeal in the state court action, which argued in part that Petitioner's incompetency during the Dissolution raised due process issues. He again requested that the hold harmless language in the Order be redacted. Respondent served and filed a timely motion for sanctions and a Respondent's Brief.

The judgment in the state court action was affirmed on appeal. "Indeed, there is nothing at issue in Charles' present lawsuit. . . that was not the subject of a claim litigated no less than twice in the divorce suit." Pet. App. D-18 In regard to the claim of incompetency, the court stated that '[m]any people suffer anxiety or depression during divorces. If Charles' idea were to take hold, nothing in our family law courts would ever be final. The trial judge here was very correct indeed to require substantial evidence of legal incompetency, not merely evidence of treatment for depression or anxiety." Pet.App. D-29

The California Appellate Court also granted Respondent's motion for sanctions. "From the record before us, for the past